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Before the

DOCKET FILE COPY ORIGINAL **Federal Communications Commission**

Washington, D.C. 20554

In the Matter of	)	
Amendment of Section 73.202(b)	)	MB Docket No. 03-144
Table of Allotments	)	RM-10733
FM Broadcast Stations	)	RM-10788
(Gunnison, Crawford, Olathe, Breckenridge,	)	RM-10789
Eagle, Fort Morgan, Greenwood Village,	)	
Loveland, and Strasburg, Colorado	)	
and Laramie, Wyoming)	)	

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Federal Communications Commission
Office of Secretary

To: Office of the Secretary
Attn: The Commission

APPLICATION FOR REVIEW

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SUMMARY

Few decisions in recent memory have elicited as much concern, confusion and disbelief within the radio industry as the decision of the Media Bureau in this case to refuse to permit an FM station to change its reference coordinates to accommodate the move of another FM station. That reaction is not surprising. Reaching far beyond its delegated authority, the Bureau reversed decades of consistent rulings which had permitted such reference point changes in FM rule making proceedings. The Bureau's change in policy is all the more remarkable because the issue had not even been raised (let alone briefed) by any of the parties. Nor did the Bureau make any public interest finding to justify the precipitous reversal of long-standing Commission precedent. Rather, the Bureau did nothing more than review the language of one irrelevant Commission rule in isolation and issue its edict.

That kind of decision-making does a disservice to parties to this proceeding, the public in general, and the radio industry as a whole. The parties to this proceeding have invested a considerable amount of money in reliance on the Commission's settled policies and practices in processing FM rule making proposals. There is nothing unreasonable in that reliance. While changes in rules and policies are a basic fact of life at the Commission, radio licensees should be able to rely on established Commission rules and policies to prepare rule making proposals particularly when no issue regarding these established policies is raised. The Administrative Procedure Act and the Commission's own policies demand no less, and contemplate that such changes will be made in an orderly fashion after all interested parties have had an opportunity to comment. To proceed in any other way would discourage radio broadcasters from making the necessary financial investments to improve their facilities to better serve their listeners.

The Bureau's decision is particularly objectionable because it is wrong as a matter of law. The decision is based solely on a literal reading – out of context – of language in Section

73.208(a)(1) of the Commission's Rules which, according to the Bureau, states that authorized transmitter sites "must be used" in determining whether rule making proposals to upgrade FM radio stations satisfy the Commission's minimum spacing rules. In light of that language, the Bureau concluded that a change in the allotment reference point violates the requirements of Section 73.208 (and with it, the minimum spacing rules of Section 73.207). But nothing in Section 73.208(a)(1) forecloses the use of a theoretical site coupled with a commitment by the licensee to apply for a site that complies with the minimum spacing rules of Section 73.207. To say, as the Bureau decision apparently does, that a rule making petition cannot propose the use of a new transmitter site for one station to allow another station to comply with Section 73.207 but *could* change that station's channel or city of license along with that same change in site reference coordinates is completely without foundation.

The Bureau's decision also suffers from an internal inconsistency. While the decision disallowed the change in allotment reference coordinates for channels occupied by stations, it approved a change in allotment reference coordinates for a vacant channel. Yet the reference coordinates for a vacant channel are protected under Section 73.208(a)(1) in just the same way as the transmitter site coordinates for an occupied channel. There is no principled way to distinguish between the two procedures.

A forum currently exists for rule and policy changes on FM allotment proceedings *Amendment of the Commission's Rules concerning Modification of FM and AM Authorizations* (RM-10960). The Bureau and the Commission should utilize that forum to make any changes – after considering comments from interested parties – rather than saddling the parties in the instant case with the extreme financial burden of trying to accommodate a sudden shift in Commission policy.

Above all, this Application for Review is about fair treatment and respect for the rule of law. It is unfair to institute a new policy without any prior notice when the original policy appeared to have been well settled, never having been raised as an issue before. A lack of respect for the law is apparent when no reason (including no public interest reason) is given for the change in policy, no one is given the opportunity to provide reasons to urge retention of the current policy, and as a result, the public is left wondering if any rule or policy can be relied upon. The Commission must restore fairness and respect for the rule of law.

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To: Office of the Secretary
Attn: The Commission

APPLICATION FOR REVIEW

KAGM, LLC, licensee of Station KAGM(FM), Strasburg, Colorado; On-Air Family, LLC, licensee of KBRU-FM, Fort Morgan, Colorado ("On-Air Family"); Regent Broadcasting of Ft. Collins, Inc., licensee of KTRR(FM), Loveland, Colorado ("Regent"); NRC Broadcasting, Inc., licensee of KSMT(FM), Breckenridge, Colorado and KTUN(FM), Eagle, Colorado ("NRC"); and AGM-Nevada, LLC, licensee of KARS-FM, Laramie, Wyoming ("AGM"), by their respective counsel, and pursuant to Section 1.115 of the Commission's Rules, hereby file their Application for Review of the decision by the Media Bureau (the "Bureau") in *Report and Order*, DA 04-2908 (rel. Sept. 20, 2004), in the above-captioned proceeding.[1]

1. The *Report and Order*, in a few cursory sentences, overruled well-settled case law concerning FM allotment proceedings. It did so despite the fact that the point of law at issue was not raised by parties to the proceeding, the public had no notice that the Bureau was contemplating a fundamental change in the law which governs FM allotment proceedings, the

[1] A summary of the *Report and Order* was published in the Federal Register on October 1, 2004 (69 Fed. Reg. 58840). Accordingly, this Application for Review is timely. *See* 47 C.F.R. §§1.115(d), 1.4(b).

Bureau received no comment from the parties or the public on the issue, and no explanation was provided as to how the change in policy better serves the public interest. The change in law is all the more egregious because the new policy was applied summarily in this proceeding to render defective a rule making proposal that fully complied with applicable law at the time it was filed.

2. The Bureau's approach not only ignores proper administrative rule making procedures but also imposes a substantial and inequitable financial burden on parties who reasonably believed that the Commission would adhere to policies and practices that have been settled for many years particularly when no issue had ever been raised by the Commission or any party with regard to that policy. But the significance of the *Report and Order* extends far beyond the particulars of this proceeding. If the Bureau can, without advance notice and comment, eliminate well-settled rule interpretations and policies, then every rule interpretation and policy is in doubt. How can anyone invest the time and money necessary to improve radio service under these circumstances? The obvious answer is that administrative agencies *are* bound by the rule of law. They *cannot* act arbitrarily as the Bureau has done in this case. The Commission should promptly rectify this egregious error by reversing the *Report and Order*. Although there is no merit to the *Report and Order's* change in policy, the Commission can, if it chooses to pursue the Bureau's approach, adopt a notice of proposed rule making or some other procedure to solicit public comment and make any changes in an orderly and fair fashion.

I. PROCEDURAL BACKGROUND

3. KAGM, LLC is the licensee of Station KAGM, Strasburg, Colorado. KAGM LLC and On-Air Family, LLC, licensee of KBRU-FM, Fort Morgan, Colorado, filed a counterproposal in this proceeding. Regent, NRC, and AGM are the licensees of the stations affected by the counterproposal, and each has agreements with KAGM, LLC to allow the counterproposal's implementation. The *Report and Order* denied the counterproposal. KAGM,

LLC and the other parties to this pleading seek to have that decision reversed and the counterproposal granted. Accordingly, they are aggrieved parties entitled to file this Application for Review. *See* 47 C.F.R. § 1.115(a).

4. The questions raised by this Application for Review are the following:

(a) Did the Bureau misinterpret Section 73.208(a) in failing to give effect to an FM radio licensee's voluntary agreement to change its allotment reference coordinates in connection with a proposal to amend the FM Table of Allotments in order to achieve compliance with the channel spacing rules set forth in Sections 73.207 and 73.208 of the Commission's Rules?

(b) Did the Bureau act arbitrarily by changing the settled interpretation of Section 73.208(a) without any notice from or to the parties to the proceeding that that there was an issue as to whether that interpretation should be changed?

(c) Did the Bureau err by changing a prior settled interpretation of Section 73.208(a) without any explanation as to how that change would better serve the public interest and without otherwise providing a reasoned explanation for the change in interpretation?

5. All of the foregoing questions should be answered in the affirmative because (1) the Bureau's failure to give effect to the licensee agreements underlying KAGM, LLC's counterproposal conflicts with duly promulgated rules, case precedent, established Commission policy, and the public interest, *see* 47 C.F.R. § 1.115(b)(2)(i); and (2) in modifying its interpretation of Commission rules, the Bureau violated basic administrative procedures to the detriment of KAGM, LLC. *See* 47 C.F.R. § 1.115(b)(v). The Commission should reverse the *Report and Order* and grant KAGM, LLC's proposal.

II. FACTUAL BACKGROUND

6. The *Report and Order* considered three proposals to amend the FM Table of Allotments. First, Dana J. Puopolo (the "Petitioner") proposed to allot Channel 299C3 to

Gunnison, Colorado. Second, Mayflower-Crawford Broadcasters ("MCB") proposed, *inter alia*, to allot Channel 272C2 at Crawford, Colorado. Third, KAGM, LLC's predecessor proposed, *inter alia*, to relocate KAGM from Strasburg to Greenwood Village, Colorado. MCB's proposal conflicted with Petitioner's proposal, and KAGM, LLC's proposal conflicted with MCB's proposal. However the KAGM, LLC proposal and Petitioner's proposal were not in conflict. Assuming the validity of all three proposals, the Bureau would have been required, in furtherance of its mandate under Section 307(b) of the Communications Act, as amended,[2] to compare the three proposals under its FM allotment priorities.[3]

7. Petitioner's Gunnison proposal furthered priority (4), since Gunnison already has local service and no white or gray area would be served. Both the MCB and the KAGM proposals furthered priority (3), because each would provide a first local service. The MCB proposal offered a first local service to Crawford, Colorado, with a 2000 U.S. Census population of 366. The KAGM proposal offered a first local service to Greenwood Village, Colorado, with a 2000 U.S. Census population of 11,035. In deciding between proposals under priority (3), the Commission compares the population of the respective communities. *See Blanchard, Louisiana and Stephens, Arkansas*, 10 FCC Rcd 9828, 9829 (1995); *Rose Hill, North Carolina, et al.*, 11 FCC Rcd 21223, 21231 (MMB1996), *recon. denied*, 15 FCC Rcd 10739 (2000), *app. for review denied*, 16 FCC Rcd 15610 (2001). Accordingly, the KAGM proposal, which would bring a first

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[2] *See* 47 U.S.C. § 307(b) (the Commission shall "provide a fair, efficient, and equitable distribution of radio service" among the various communities).

[3] Those priorities are: (1) first full-time aural service; (2) second full-time service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982).

local service to the larger community of Greenwood Village, would have been favored over the MCB proposal.[4]

8. However, the Bureau did not reach this result, because it excluded the KAGM proposal from comparative consideration. Before KAGM could be relocated to Greenwood Village, several other changes would have been required. As the *Report and Order* correctly recited, the Greenwood Village allotment required the relocation of KBRU-FM from Fort Morgan to Strasburg and the relocation of the transmitter sites for KSMT, Breckenridge, Colorado and KTRR, Loveland, Colorado. These two transmitter site relocations, in turn, required the relocation of the transmitter sites for KTUN, Eagle, Colorado, and KARS-FM, Laramie, Wyoming. KAGM, LLC had secured the consent of all affected licensees to make the required changes to their facilities. The resulting arrangement of allotments would have complied fully with the Commission's spacing rules, as demonstrated in the engineering statement accompanying the proposal. It also complied with prior case law, which clearly permitted a change in channel, community of license, and/or transmitter site to be made in connection with a proposal to amend the FM Table of Allotments in order to achieve compliance with the Commission's spacing rules.

9. Although it acknowledged several prior cases in which proposals similar to KAGM's were granted, the Bureau refused to give effect to the voluntary agreements of Stations KSMT, KTRR, KTUN, and KARS-FM to relocate their respective transmitter sites. The Bureau recognized that "the staff has accepted these fictional reference points in prior decisions" but held that those decisions were "overruled" and that "proffers of hypothetical transmitter site relocations to change reference points for licensed stations" are no longer permissible under the

[4] Had the Bureau granted the KAGM proposal, it could also have granted the Gunnison proposal, since those two proposals were not in conflict.

Bureau's new interpretation of the rules. *See Report and Order* at ¶ 5. It held that these "defects" removed the KAGM proposal from comparative consideration. As a result, the *Report and Order* granted the MCB proposal (which, of the two remaining proposals, better furthered the FM allotment priorities).[5]

III. DISCUSSION

A. The *Report and Order* Conflicts with the Commission's Rules.

10. The Bureau asserts that the voluntary agreement of a licensee to change its transmitter site is "contrary to the plain language of the rule." It is not clear which rule – Section 73.207 or 73.208 – the Bureau was referencing (this lack of specificity in and of itself renders the *Report and Order* defective).[6] If it meant Section 73.208, the *Report and Order* clearly misread that rule. It is not possible for a rule making proponent to violate Section 73.208 at all. Section 73.208(a) does nothing more than set forth the reference points that must be used to determine whether a proposal to amend the FM Table of Allotments meets the required distance separations.[7] If a rule making proposal fails to follow Section 73.208 and uses the wrong coordinates, then its proposal may violate Section 73.207, which sets forth the distance separations. But it would not violate Section 73.208, because in order to determine compliance with Section 73.207, the proper reference points *must* be used. Only the Commission *itself* can violate Section 73.208, which would be the case if it granted a proposal based on the use of the wrong reference points.

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[5] Subsequently, after the *Report and Order* was issued, MCB modified its proposal to specify Channel 272C3 and thereby eliminated the mutual exclusivity with KAGM and Petitioner's proposals. Thus, the proceeding is no longer contested.

[6] *See infra*, Section III.C.

[7] Specifically, the following reference points are to be used: (i) transmitter sites if authorized or proposed in applications with cut-off protection; (ii) reference coordinates designated by the FCC; (iii) coordinates listed in the Index to the National Atlas of the U.S.A; and (iv) coordinates of the main post office. By the terms of Section 73.208(a), these reference points are to be considered in order, so that, for example, reference coordinates designated by the FCC are only considered when there is no authorized or applied-for transmitter site.

11. On the other hand, if the *Report and Order* considered Section 73.207 to have been violated by the KAGM proposal, then its conclusion is simply wrong, because the KAGM proposal complies with Section 73.207. Clearly, the proposal to relocate Station KAGM from Strasburg to Greenwood Village, standing alone, would not be acceptable, because it would violate Section 73.207. It would do so because KAGM would not meet the required spacing to the authorized transmitter site of either KTRR or KSMT, as prescribed by Section 73.208(a)(i). Had the KAGM proposal stopped there, it would have been correct for the Bureau to conclude that the proposal was defective for failure to comply with Section 73.207 (but incorrect to conclude that it failed to comply with Section 73.208). However, the proposal did not stop there. It proposed to eliminate these short spacings by changing the transmitter sites of KTRR and KSMT. Specifically, the licensee of KTRR agreed to relocate its transmitter site approximately 14 kilometers to the northeast, and the licensee of KSMT-FM agreed to relocate its transmitter site approximately 10 kilometers to the southwest. Similar agreements were reached with the licensees of KTUN and KARS-FM, which were necessitated by the relocations of KTRR and KSMT. Taking these four transmitter relocations into consideration, the KAGM proposal as a whole complies with Section 73.207. Using the new transmitter sites for the four affected stations, to which the licensees had agreed to relocate, KAGM at Greenwood Village meets the required separations set forth in Section 73.207.

12. The Bureau's discussion of Section 73.208(a)(2) is also puzzling. The *Report and Order* asserts that KAGM, LLC's proposal cannot avail itself of the provisions of Section 73.208(a)(2) because that section does not apply to authorized stations. *Report and Order* at ¶5. This clearly is not the case. Section 73.208(a)(2) states:

> When the distance between communities is calculated using community reference points and it does not meet the minimum separation requirements of §73.207, the

> channel may still be allotted if a transmitter site is available that would meet the minimum separation requirements and still permit the proposed station to meet the minimum field strength requirements of §73.315. A showing indicating the availability of a suitable site should be submitted with the petition. *In cases where a station is not authorized* in a community or communities and the proposed channel cannot meet the separation requirement a showing should also be made indicating adequate distance between suitable transmitter sites for all communities.

47 C.F.R. § 73.208(a)(2) (emphasis added).

13. The italicized phrase of the last sentence of Section 73.208(a)(2) quoted above makes clear that its provisions apply to vacant allotments ("cases where a station is not authorized"). If the first two sentences of Section 73.208(a)(2) applied only to vacant allotments, as the Bureau asserts, then the last sentence would be redundant, because it would set forth what had already been stated previously. It is an elementary principle that a provision is read in a way that does not render any of its terms redundant. Accordingly, the first two sentences must apply to authorized stations. This is how it has always been interpreted. Section 73.208(a)(2) grants the Commission authority to make a "site-restricted" allotment – *i.e.*, one that is not allotted at the reference coordinates of the community to be served. *Corinth, Hadley and Queensbury, New York*, 5 FCC Rcd 3243 (1990). A site restriction is necessary when a station located at the community reference coordinates would not be fully spaced under the rules. *Id.* This includes spacings to authorized and proposed transmitter sites, vacant allotments, and other communities. *See* 47 C.F.R. §§ 73.207-208. The Commission routinely makes site-restricted allotments of both authorized and vacant channels, all of which would be precluded under the Bureau's crabbed reading of Section 73.208(a)(2). *See, e.g., Crisfield, Maryland, et al.*, 19 FCC Rcd 14612 (2004).

B. In Failing to Give Effect to a Voluntary Transmitter Site Relocation, the *Report and Order* is Contrary to Decades of Case Law, Including Decisions by the Commission that are Binding on the Bureau.

14. The Bureau exceeded its delegated authority in the *Report and Order*. The Bureau is required to refer to the Commission any matters "that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines." 47 C.F.R. § 0.283. The *Report and Order* constituted a reversal of decades of case law and other rules and policies (like the one-step procedure) adopted by the Commission. *A fortiori* the *Report and Order* necessarily involved an improper disregard of binding precedent. Accordingly, the Bureau was without authority to change policy in this manner. The *Report and Order* must be reversed on this ground alone.

1. The *Report and Order* Is Contrary to Well-Settled Case Law, Including Decisions of the Commission.

15. Commission policy has always sanctioned a voluntary transmitter site change in connection with a change to the FM Table of Allotments. *See e.g., Claremore, Oklahoma, et al.*, 2 FCC Rcd 5921 (MMB 1987), *recon.*, 3 FCC Rcd 4037 (MMB 1988), *aff'd*, 4 FCC Rcd 2181 (1989). In *Claremore*, the Bureau initially allotted Channel 233A at Claremore, Oklahoma. That allotment was short-spaced to the licensed transmitter site of KNFB-FM, Nowata, Oklahoma. However, the KNFB-FM licensee agreed to relocate its transmitter site to accommodate the Claremore allotment. The situation changed when the KNFB-FM license changed hands and the new licensee refused to relocate its transmitter site. The Commission upheld on review the new licensee's refusal to relocate, and rejected the proposal because the transmitter site relocation was no longer voluntary. In doing so, the Commission implicitly affirmed the staff's original action granting the allotment and the accompanying transmitter site relocation (when the prior licensee had voluntarily agreed to relocate its transmitter site): "The

Report and Order was premised on the KNFB-FM transmitter site relocation." *Claremore*, 4 FCC Rcd at 2182. Accordingly, the Commission has upheld a rule making proponent's ability to relocate a transmitter site with the consent of the affected licensee in order to achieve compliance with Section 73.207. The Bureau has no authority to overrule this binding precedent.[8]

16. The *Report and Order* recited three other cases which it acknowledged were inconsistent with its decision: *Auburn, Alabama, et al.*, 18 FCC Rcd 10333 (MB 2003); *Old Fort, North Carolina, et al.*, 18 FCC Rcd 12181 (MB 2003); and *Big Pine Key, Florida, et al.*, 13 FCC Rcd 15542 (MMB 1998). Those cases do indeed stand for the proposition that a change in reference coordinates in the rule making context is permissible. In *Auburn*, the licensee of WAYI consented to change its transmitter site in order to provide clear spacing for a new allotment to Jemison, Alabama. In *Old Fort*, the proposal to bring a first local service to Fletcher, North Carolina required the relocation of the transmitter site of WEYE, Surgoinsville, Tennessee. In *Big Pine Key*, the licensee of WJBX agreed to a transmitter site change in order to accommodate a proposal to upgrade service at Clewiston, Florida. None of these cases raised any issue concerning the legality of agreeing to a site change to accommodate a rule making proposal. Nor has there ever been any issue raised concerning the implementation of these rule makings as far as can be determined.

17. However, as the Bureau implicitly acknowledged, those three cases were only the tip of the iceberg. *See Report and Order* at ¶5 n.14. In addition to *Claremore* and *Muncie*, *supra* (decided by the full Commission), there are at least *ten* other Bureau-level decisions which

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[8] The Commission had already indicated its assent to the practice of accepting a voluntary transmitter site relocation in order to achieve compliance with spacing rules in a much earlier decision. The Commission affirmed on public interest grounds the denial of a proposal to allot Channel 221A to Eaton, Ohio together with a transmitter site change to afford clear spacing, but indicated that the transmitter site change (with unambiguous consent from the affected licensee) would not have been an impediment. *Muncie, Indiana and Eaton, Ohio*, 59 F.C.C.2d 778 (1976).

conflict with the *Report and Order*, bringing the total to at least fifteen (15) cases that require reversal, including the two passed upon by the full Commission. These fifteen cases are not intended to be an exhaustive list of all the cases that contradict the Bureau's reasoning in the present case. They are merely a representative sample. Their significance is inescapable. All of these cases – which involved only reference point changes for existing stations or cut-off applications in order to achieve compliance with spacing rules – are inconsistent with the decision in the *Report and Order*.

- In *Moberly, Missouri, et al.*, 16 FCC Rcd 21182 (MMB 2001), a proposal was granted that included a transmitter site change for KNIM, with the licensee's consent to a "change in transmitter site reference coordinates." *Id.* at 21185.

- In *Avalon, California, et al.*, 16 FCC Rcd 5389 (MMB 2001), the Bureau changed the reference coordinates of KMLT, Thousand Oaks, California.

- In *Cross Plains, Texas, et al.*, 15 FCC Rcd 5506 (MMB 2000), three licensees (Stations KVRW, KKAJ, and KYXS) agreed to change their respective transmitter sites to accommodate various rule making proposals.

- In *Colonial Heights, Tennessee*, 11 FCC Rcd 18079 (1996), the licensee of WAEY-FM, Princeton, West Virginia was required to change its transmitter site to accommodate an upgrade at Colonial Heights, Tennessee.

- In *Detroit, Howe, and Jacksboro, Texas*, 13 FCC Rcd 16561 (MMB 1998), a rule making proposal required the amendment of the pending and cut-off application for KYXS, Mineral Wells, Texas to specify a new transmitter site.

- In *Florence, South Carolina, et al.*, 19 FCC Rcd 4348 (MB 2004), a proposal involving a transmitter site change for WIXV was held to be properly presented, and failed only on comparative grounds when a competing proposal offered greater public interest benefits.

- In *Ketchum, Idaho, et al.*, 19 FCC Rcd 292 (MB 2004), a counterproposal involving a site change for noncommercial educational Station KPCW was granted. An application for the change had already been granted at the time of the decision, but the station had not yet relocated, and moreover, no application was on file at the time the counterproposal was tendered.

- In *Apopka, Maitland and Homosassa, Florida*, 18 FCC Rcd 23754 (MB 2003), the licensee of WXCV consented to a transmitter site change and then filed an application to do so.

- In *Bethel Springs, Tennessee*, 17 FCC Rcd 14472 (MB 2002), the Bureau analyzed a proposal ("Option II") which required a modification of the transmitter site for KGKS. The clear implication of the Bureau's reasoning was that the proposal would have been acceptable but for the lack of the licensee's consent to the change.

- In *Monticello, Arkansas and Bastrop, Louisiana*, 16 FCC Rcd 7220 (MMB 2001), the Commission issued an order to the Bastrop licensee to show cause why its channel should not be changed, or in the alternative, its transmitter site modified to a site that would accommodate the upgrade at Monticello. Ultimately, the Commission ordered the channel change, but had the licensee consented, the transmitter site relocation was clearly a valid alternative.

18. All fifteen cases discussed above, decided over a period of nearly three decades, stand for the proposition that the Commission will modify the authorized transmitter site of a licensed station, or the proposed transmitter site of an application with cut-off protection, in the absence of any other changes to the affected station, in order to accommodate a proposal to amend the FM Table of Allotments. They are indistinguishable from the instant case. In each case, Section 73.208(a)(1)(i) was invoked to select the reference coordinates that must be protected, and then the necessary protection was created through a modification of those reference coordinates.[9]

19. The *Report and Order* nonetheless states that "licensees cannot selectively exempt themselves from the foundational requirement of full Section 73.207 spacing," implying that the practice at issue would compromise the integrity of the FM Table of Allotments. But none of the fifteen cases discussed above involved the creation of a short-spaced or defective

[9] There is no difference in principle between the relocation of a station's allotment reference coordinates and the relocation of its transmitter site. The Commission specifies reference coordinates in connection with an allotment in order to demonstrate the theoretical availability of a transmitter site that is fully spaced according to the Rules. When a licensee applies for and constructs facilities at a fully spaced transmitter site, the actual transmitter site replaces the reference site, and the reference coordinates no longer need to be afforded protection. This is why Section 73.208(a) establishes that an actual transmitter site is to be protected first, but if no transmitter site exists, then the reference site is to be protected. Even if a non-fully spaced transmitter site is applied for pursuant to Section 73.215 of the Rules, a fully spaced allotment reference site must also be specified. *FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4737 (1993).

allotment. In every case, the integrity of the Table was maintained by preserving fully spaced reference coordinates for each allotment.

20. It is also noteworthy that none of the foregoing decisions even intimated that there were potential problems with this procedure. The absence of such indication is not surprising. To begin with, there is nothing in the rule making history in the adoption of Section 73.207 or 73.208 which supports the Bureau's new interpretation. *See Modification of FM Broadcast Station Rules*, 94 FCC2d 152 (1983). That may explain why no opposing party ever raised the issue in any of the foregoing cases, even though parties presumably had every incentive to comb the Commission's Rules for any potential defect in their opponents' cases. The absence of any supporting explanation when the Commission adopted the rule may also explain why the Commission itself never raised the issue in any of those cases. In this context, it defies credulity to say, as the *Report and Order* does, that the Bureau suddenly noticed after all these years that this long-utilized procedure, accepted by the Commission in countless cases, somehow violates the literal language of Section 73.208 and that the violation is of such importance that it needed to be redressed immediately without notice to or comment from affected parties and without regard to the inequitable financial burden it would impose on them.

2. The *Report and Order* Is Irreconcilable with the Fundamental Procedures Used in Allotment Decisions.

21. In addition to all of the cases directly on point, there is no principled way to distinguish a proffer of a transmitter site relocation from two other practices routinely followed by the Commission in allotment cases. Specifically, (1) the Commission routinely orders a change in the reference coordinates of a vacant allotment, and (2) the Commission routinely orders a change in the reference coordinates of an allotment in connection with a change in channel or class for that allotment.

22. The reference coordinates of a vacant allotment are protected under the very next provision of Section 73.208 after authorized transmitter sites of assigned allotments. *See* 47 C.F.R. § 73.208(a)(1)(ii). If there is some legal theory under which it is impermissible to modify an authorized transmitter site with the licensee's consent under Section 73.208(a)(1)(i), then that same legal theory would presumably make it impermissible to modify the reference coordinates of a vacant allotment under Section 73.208(a)(1)(ii).

23. The underpinnings for that conclusion are self-evident. In allotment proceedings, the Commission is only concerned with allotments *per se*, not the identity of the licensees operating pursuant to those allotments. The Commission is merely charged with the equitable distribution of allotments among the states and communities. 47 U.S.C. § 307(b). Whether a particular arrangement of allotments furthers the public interest has nothing to do with the identities of individual licensees, or whether those allotments are vacant or occupied. For example, the Commission recently confirmed that neither multiple ownership issues nor a particular licensee's intentions are relevant considerations in allotment decisions. *Athens and Doraville, Georgia*, DA 04-3057 (Sept. 27, 2004). For this reason, it cannot make a difference under Section 307(b) whether the Commission is modifying a vacant allotment or an occupied allotment.

24. This point cannot be overemphasized. If it now believes that allotment changes must take into account whether the channel is authorized, then, to be consistent, the Bureau would need to consider whether an existing station owner can request a change to the Table which cannot be implemented at the application stage consistent with the multiple ownership rules. However, when the Commission is dealing with the channel allotment and not with authorizations, the Commission may appropriately choose not to consider matters pertaining to

the particular licensee or its authorization. That is why changing reference coordinates can be properly considered in rule makings whether the channel is vacant or occupied.

25. The Commission has never questioned its authority to modify the reference coordinates of a vacant allotment. In *Fair Bluff, North Carolina*, 11 FCC Rcd 12662 (1996), the Bureau held that while a reference point change could not be the subject *by itself* of a petition to amend the FM Table of Allotments (because there would be nothing to amend), a reference point change could be entertained as long as some other change to the Table of Allotments was proposed. *Fair Bluff*, 11 FCC Rcd at 12666. This extensively reasoned case, decided on reconsideration, changed the reference coordinates of a vacant allotment. However, as discussed above, occupied allotments and vacant allotments are treated on an equal footing by Section 73.208(a), using the authorized transmitter site in the case of the former and the Commission's reference point in the case of the latter. If one can be changed in rule making, then so can the other.

26. Indeed, the Bureau changed a reference point in this very proceeding. MCB's proposal to allot Channel 272C2 at Crawford did not meet the required spacings under Section 73.207. MCB's proposal was short-spaced to both the authorized transmitter site of KVLE-FM, Gunnison, Colorado, and the FCC-specified reference coordinates for the vacant Channel 270C2 allotment at Olathe, Colorado. These are exactly the same kind of spacing violations that the Bureau held rendered KAGM's proposal defective. If MCB's proposal were made subject to the Bureau's new interpretation of Section 73.208(a), MCB should have been, like KAGM, required to utilize the authorized transmitter site of KVLE-FM and "reference coordinates designated by the FCC" for Channel 299C3. But the Bureau did not hold MCB's proposal to the same allegedly strict standards of Section 73.208(a) as KAGM, LLC's proposal. Instead, the Bureau

allowed MCB to change both the channel of KVLE-FM and the reference point of vacant Channel 299C3. *Assuming those changes were made*, the resulting arrangement of allotments would satisfy Section 73.207. But that is no different than saying that, if the four station transmitter site changes contemplated by KAGM's proposal are made, KAGM's proposal similarly satisfies Section 73.207. It is readily apparent that the Bureau interpreted the same rule to treat the two proposals differently.

27. Similarly, if it lacks authority to modify a transmitter site to comply with Section 73.207 spacing rules, then the Commission certainly lacks the authority to modify a station's transmitter site *and at the same time* its community of license, channel, or class in order to comply with Section 73.207 spacing rules. Both procedures must stand or fall by the same rules. Yet the Bureau apparently perceives some distinction between the two – a distinction that it has failed to acknowledge or explain – since it did not distinguish the innumerable cases in which it has changed a station's transmitter site in connection with a change in community of license, a change in channel, or a change in class of channel. In fact, nearly every allotment case involves a change in an allotment reference point of some sort, and these cases are not reconcilable with the Bureau's reasoning in this case.

28. For example, in *Cloverdale, Warrior and Montgomery, Alabama*, 10 FCC Rcd 16360 (MMB 1995), *aff'd by the Commission*, 15 FCC Rcd 11050 (2000), the Bureau considered a proposal to upgrade Station WBLI, Warrior, Alabama. That upgrade did not comply with Section 73.207 with respect to the transmitter site of Station WBAM, Montgomery, Alabama. The Bureau ordered WBAM to downgrade and relocate its transmitter site (based on its consent) in order to achieve compliance with Section 73.207.[10] Had the Bureau considered the existing

[10] The downgrade and transmitter site relocation by WBAM could have been accomplished by the filing of an application as well.

transmitter site of WBAM, the proposal would not have complied with Section 73.207 and no remedy would have been available. But the Bureau did not read the rule so restrictively and instead considered the proposed arrangement of allotments, including the proposed transmitter site relocation. This case was affirmed by the Commission, and the Bureau lacks the authority to overrule it.

29. There is no principled way to distinguish the proposal in *Cloverdale* from KAGM, LLC's proposal in this case. In each case, a proposed allotment failed to protect an existing transmitter site. Even after the downgrade in *Cloverdale*, the proposed allotment failed to provide clear spacing. Just as in KAGM, LLC's proposal, clear spacing was only achieved by relocating the station's transmitter site. *Cloverdale* is a Commission-level decision, but is otherwise representative of the hundreds of allotment decisions that have involved transmitter site relocations. In short, the decision in the *Report and Order* cannot be accepted without causing an upheaval in virtually all allotment case law and procedures.

3. The *Report and Order* Is At Odds with the Procedures for Allotment Changes in One-Step Applications.

30. Although never discussed (and presumably never considered), the Bureau's decision is at odds with "one-step" application procedures for achieving certain changes to the FM Table of Allotments. In a "one-step" application, a licensee is required to demonstrate the existence of an allotment reference site that complies with Section 73.207 spacing requirements. *See FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, 4737-38 (1993). A one-step application may change a station's current reference coordinates, and indeed, often does so when a change in channel or class is requested. Moreover, a one-step application that does not protect another station's current transmitter site – the very practice which the Bureau held offends allotment standards in the *Report and Order* – may be accepted and granted together

with the other station's application to change its transmitter site under the rule governing contingent applications. *See* 47 C.F.R. § 73.3517(e). A one-step application can actually be used to implement a rule making order in a way that achieves a transmitter site relocation that would be forbidden under the rule adopted in the *Report and Order.*[11]

31. These scenarios create an obvious inconsistency between one-step procedures and the *Report and Order*. The one-step procedures are designed to mirror allotment procedures. The Commission stated that "it would be contrary to sound allotment policy for parties to receive modifications by using the one-step process that would be denied under the two-step process." *FM Channel and Class Modifications by Application, supra*, 8 FCC Rcd at 4737. Yet the *Report and Order* creates precisely the situation the Commission stated that it would not countenance. Under the Bureau's new interpretation, certain modifications to the Table of Allotments would only be possible through one-step applications and not through petitions for rule making. Thus, the *Report and Order* is, in the Commission's own words, "contrary to sound allotment policy." *See id.* Had it raised the issue with the parties and permitted the filing of comments on the issue, the Bureau would have recognized that there is no way to reconcile all of these inconsistencies.

C. Even if the Bureau Had the Authority to Change the Law, It Failed to Follow Proper Procedures to Change the Law In This Case.

32. Even if the Bureau were within its authority to refuse to give effect to an agreement by a licensee to change its transmitter site in order to achieve compliance with the spacing rules of Section 73.207 (and for the reasons given above, it was not within its authority to do so), the *Report and Order* still suffers from fatal procedural defects.

33. To begin with, the *Report and Order* acknowledges that the Bureau's decision is inconsistent with recent cases. *See Report and Order* at ¶ 5 n.14. While an agency is permitted

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[11] *See* discussion of MB Docket 02-376, *infra,* Section III.D.

to depart from precedent in this manner, it cannot do so without a reasoned explanation. *Greater Boston Television Corp.*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). *See National Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 701 (2d Cir), *cert. denied*, 423 U.S. 827 (1975) (an agency must provide a "thorough and comprehensible statement of the reasons for its decision"). An agency decision that departs from established precedent without a reasoned explanation will be vacated as arbitrary and capricious. *Graphic Comm's Intern. Union Local 554 v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988). The explanation given by the Bureau is deficient by any standard, and a reader can only guess as to what the underlying reasoning might be.

34. The *Report and Order* states that a voluntary transmitter site relocation is "contrary to the plain language of the rule." *See Report and Order* at ¶ 5. It is unclear which "rule" this statement is referencing, but it is presumably Section 73.208, since Section 73.207 does not refer to transmitter sites. But this reasoning is incoherent, for the reasons given above.[12] A rule making proponent cannot violate Section 73.208. Nor are the licensees who agreed to transmitter site relocations "voluntarily exempting themselves from the foundational requirements of Section 73.207" as the Bureau states. *See Report and Order* at ¶ 5. As discussed above, the proposed arrangement of allotments in this case complies fully with Section 73.207, as did the arrangements of allotments in each of the cases cited by the Bureau. Finally, for the same reason, the proposal did not "fail[] to comply with the minimum spacing requirements of Section 73.207." *See Report and Order* at ¶ 5. Rather, the proposal complies fully with all spacing requirements. Essentially, the Bureau left the public completely in the dark

12 *See* Section III.A, *supra.*

as to its reasoning, and it is unclear exactly how future proposals can comply with the new interpretation of Sections 73.207 and 73.208.

35. Not only is the Bureau's reasoning terse to the point of incomprehensibility, but in overruling a long line of settled precedent on its own motion, without having the issue raised, briefed, or commented upon, the Bureau also violated basic administrative procedure. An agency undertaking to change its interpretation of a rule must afford the public adequate notice and an opportunity to comment. *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992). The Bureau did not do so here. True, this was a rule making proceeding conducted under the informal rule making provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 553. However, the Bureau gave no notice that it intended to address *this particular rule* in this proceeding, which it must do in order to satisfy its procedural obligations. *See Chemical Waste Management v. EPA*, 976 F.2d 2, 33 (D.C. Cir. 1992). *See also* 5 U.S.C. § 553(c).

36. Further compounding the procedural infirmities in this case, the Bureau decided, with no explanation at all, that the new rule interpretation should apply to the parties before it in this case, who had acted in good faith on the clear application of existing case law. Thus, the Bureau applied its new rule interpretation not merely prospectively (*i.e.*, to future cases), but retroactively to the parties before it as well. While the Bureau may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must make an affirmative finding on the record that the retroactive application of such a rule is appropriate. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986). It made no

finding whatsoever regarding retroactive application in this case, and so its action is invalid for this independent reason.[13]

37. There is no reason why the parties to the instant proceeding should not be entitled to have their proposals considered under the rules in effect when they were filed. They have made many decisions, involving the expenditure of millions of dollars, in reliance on the Commission's established allotment rules and procedures. The *Report and Order* provides no explanation as to why the public interest demands that the Bureau's new interpretation of a rule and its reversal of a decades-long allotment process must be implemented immediately to the substantial detriment of private parties who reasonably relied on settled precedent. If the Bureau believed that change was needed, it should have proceeded in a prospective manner - - providing interested parties with an opportunity to comment on the Bureau's new interpretation and whether there might be another way to resolve the issue it raised on its own initiative. To proceed any other way sows confusion and discourages private investment. The *Report and Order* conveys the impression that the Bureau has no respect for the rule of law and that it is willing to act in an arbitrary fashion without regard to the equities of parties who have relied on its prior pronouncements. It is difficult to understand how that approach can serve the public interest.

38. These concerns are all the more troubling because the Bureau did not have to rule on this issue in this case. Pending before the Bureau is a petition for rule making that address many issues regarding the Commission's allotment processes. *See Amendment of the*

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[13] The Bureau's approach in this case stands in sharp contrast to other proceedings in which the Commission has made efforts to accommodate the equities of private parties who made investments and based their decisions on preexisting policies. In adopting new media ownership rules, for example, the Commission issued a notice of proposed rule making in which it proposed to make joint sales agreements ("JSAs") an attributable ownership interest. Although the public had ample notice of the impending change, the Commission decided to give affected parties two years to comply with the new rule that made JSAs attributable. *2002 Biennial Regulatory Review*, FCC 03-127 (July 2, 2003) at ¶ 325 (subsequent history omitted).

Commission's Rules Concerning Modification of FM and AM Authorizations (RM-10960).[14] The Bureau will have the opportunity to raise the issue of whether to permit transmitter site relocations in the context of this petition and can solicit public comment on the issue and then make its decision on the basis of a full record. Instead, the Bureau has foreclosed this opportunity and already decided to rule without comment and without explanation of its decision. By proceeding in this manner, it has singled out KAGM, LLC, the unfortunate proponent in this case, for unfair treatment when the issue is one of universal applicability. The public is far better served when it is invited to participate in regulatory decisions affecting its livelihood.

39. Among other benefits, if it had based its decision on public comment, the Bureau could have considered alternative approaches rather than the outright prohibition on reference point changes announced in the *Report and Order*. For example, a possible alternative could be to require a rule making proponent relying on a transmitter site change to file its application for the site change at the same time. The Bureau could then process the application and the rule making proposal concurrently. This approach has been followed in several proceedings. *See, e.g., Ketchum, Idaho, et al.*, 19 FCC Rcd 292 (MB 2004); *Apopka, Maitland and Homosassa, Florida*, 18 FCC Rcd 23754 (MB 2003). The Bureau has also processed rule making proposals and applications together in other contexts without finding impermissible contingency between the two. *See Marion and Johnston City, Illinois*, 18 FCC Rcd 15346 (2003).

[14] This petition was filed by First Broadcasting Investment Partners, LLC ("First Broadcasting") and was placed on public notice on April 22, 2004 with a comment deadline of May 24, 2004. Public Notice, Report No. 2657 (Apr. 22, 2004).

D. Had the Bureau Considered the Public Interest, it Would Have Found that the Existing Interpretation is Preferred to the Interpretation Announced in the *Report and Order*.

40. The Bureau offers no indication at all that it has considered the public interest in deciding to overrule precedent and establish new law. If the Bureau had considered the public interest, it would have favored the old rule interpretation, under which a licensee could voluntarily relocate its transmitter site in order to achieve compliance with Section 73.207.

41. To the extent that the Bureau may believe that its new rule interpretation conserves resources by preventing certain kinds of allotment proposals, it is wrong. In fact, the new rule interpretation creates perverse incentives for rule making proponents to engage in wasteful procedures that burden the Commission's processing staff and serve no purpose but to accomplish the same thing but in two steps. For example, in MB Docket No. 02-376, the Commission has pending a proposal to allot a first local service to Davis-Monthan Air Force Base, Arizona. The proponent had secured the consent of the licensee of KZZP, Mesa, Arizona, to relocate its transmitter site to accommodate the new allotment. Before the Bureau changed the rule interpretation in this case, the Davis-Monthan allotment would have involved a routine comparison of proposals. However, in order to avoid the potential "defect" of a transmitter site relocation created by the *Report and Order* in this case, the proponent recently filed an amendment to its proposal to substitute instead a downgrade from Class C to C0 for KZZP. In order to consider the downgrade in class, the Bureau will need to review additional gain-loss and remaining services studies. Moreover, it is obvious that the KZZP licensee has no reason to implement the downgrade (even though it consented to it), because at the implementation stage with no loss of protection, it can immediately apply, under the Commission's one-step upgrade procedures, for a full Class C facility, specifying the allotment reference coordinates that were initially proposed in the rule making proceeding! Thus, the Bureau will perform the useless

exercise of downgrading the allotment and then upgrading it again. Does the Bureau really want licensees to downgrade their class of channel as part of a rule making proposal when a change in reference coordinates could make the lead proposal comply with the spacing rules with no loss of radio service?

42. The *Report and Order* also disregarded the rule governing implementation of transmitter site reference point changes after a rule making proposal is granted. The Commission's contingent application rule permits the acceptance of up to four mutually contingent applications so long as agreements have been reached among the licensees to implement the applied-for changes. *See* 47 C.F.R. § 73.3517(e). Just like KAGM, LLC's proposal in this case, such contingent applications involve a station modification that cannot be made unless and until changes to other stations are effectuated. *See 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 14 FCC Rcd 5272, 5280 (1999). The Commission has concluded that a prohibition on such modifications was inconsistent with its statutory mandate under Section 307(b), because it would "discourage[] coordinated facility changes that could increase service." *Id.*, 14 FCC Rcd at 5283.

43. That same reasoning applies to this proceeding. KAGM, LLC's proposal offers a substantial increase in service, to approximately 2.8 million people. It also offers a first local service, furthering priority (3) of the FM allotment priorities.[15] To realize these significant gains, coordinated facility changes will have to be undertaken, and agreements have been reached with all the stations involved. When it considered the issue previously, the Commission concluded that the benefits of permitting such coordinated improvements outweighs the potential

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[15] *See* note 3, *supra*.

detriments. 14 FCC Rcd at 5283. The same public interest considerations apply here. KAGM, LLC's agreements with the four licensees are just like the agreements the Commission requires in contingent application scenarios. They help to remove any uncertainty as to whether the KAGM upgrade will be effectuated.

IV. CONCLUSION

44. The manner in which the Bureau acted in this case is unprecedented. Surely an agency action, particularly a staff action taken pursuant to delegated authority, has to comply with substantive law and procedural fairness. The *Report and Order* in this case does neither. In failing to give effect to an agreement to voluntarily relocate an FM station's transmitter site, the Bureau contravened well-established case law, including cases decided by the Commission that the Bureau has no authority to overrule. It did so with no notice to the public, no opportunity to comment, and no public interest finding. The Bureau then applied its novel legal theory to the unsuspecting rule making proponent in this case without any indication that it had considered the public interest in general or the inequities being visited on the proponent. If an administrative agency, bound by the rule of law and the public interest, can act in this manner, then no member of the regulated public can feel secure in any action it takes in reliance on prior case law and Commission policy.

45. At a minimum, a rule change of this nature requires that the Commission solicit comment from interested members of the public and base its decision on consideration of the relevant factors. Had the Bureau done so in this case, it would have found that the rule interpretation change is at odds with recent policy decisions of the Commission and is contrary to the public interest. Based on the record in this proceeding, the Commission should reverse the *Report and Order* and grant KAGM, LLC's superior rule making proposal. Only by doing so can the Commission restore public confidence in the rule of law.

Respectfully submitted,

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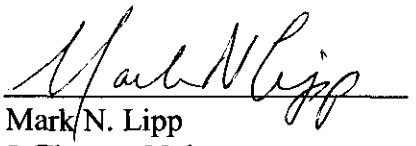
ON-AIR FAMILY, LLC

By: 
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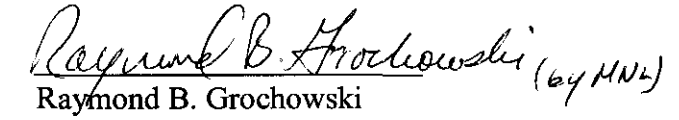
By: 
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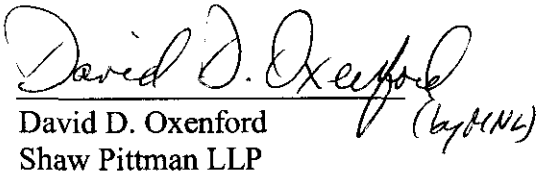
By: 
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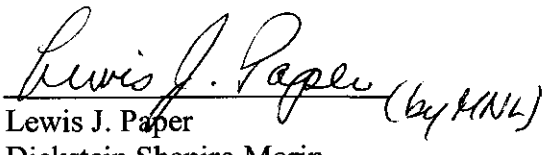
By: 
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